ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
OIL COUNTRY TUBULAR GOODS FROM MEXICO	)	**Secretariat File No. USA-MEX-2001-1904-06**

DECISION OF THE PANEL

March 22, 2007

Panelists: Mark R. Sandstrom, Chair
Boris Otto
Morton Pomeranz
Fernando Serrano
Gustavo Uruchurtu

Appearances:

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I. INTRODUCTION

This Binational Panel was constituted under Article 1904(2) of the North American Free Trade Agreement ("NAFTA") and Section 516A(g) of the Tariff Act of 1930, as amended (the "Tariff Act").[1] The Panel was appointed to review the determination of the United States International Trade Commission ("Commission"), under Section 751c of the Tariff Act[2], (1) that imports of oil country tubular goods ("OCTG") from Mexico would be likely to compete with imports of OCTG from the other subject countries and with the domestic like product, and (2) that revocation of the antidumping orders and countervailing duty order on OCTG from Argentina, Mexico, Italy, Japan and Korea would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Views of the Commission (confidential version) are found in Oil Country Tubular Goods From Argentina, Italy, Japan, Korea and Mexico, Inv. Nos. 701-TA-364 (Review) and 731-TA-711 and 713-716 (Review), June 2001 ("Review Determination"). The public version of the Views of the Commission are found in Oil Country Tubular Goods From Argentina, Italy, Japan, Korea and Mexico, Inv. Nos. 701-TA-364 (Review) and 731-TA-711 and 713-716 (Review), USITC Pub. 3434 (July 2001).

Tubos de Acero de Mexico, S.A. ("TAMSA") timely filed a Request for Panel Review of the Review Determination under Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Reviews ("NAFTA Panel Rules"). Notices of appearances in the Panel Review were filed by the Investigating Authority, United States International Trade Commission ("Commission"), the United States Steel Corporation, as well as IPSCO

[1] 19 U.S.C. § 1516a(g).
[2] 19 U.S.C. § 1675(c). This section governs five-year "Sunset" reviews.

Tubulars Inc., Lone Star Steel Company, Maverick Tube Corporation, Newport Steel Corporation, North Star Steel Ohio, a Division of North Star Steel Company, Koppel Steel Corporation, a Division of NS Group, and Grant-Prideco Inc., all Interested Parties to the underlying sunset review proceeding. The Complainant, the Commission, and the Interested Parties are referred to collectively as the Participants in the Panel Review.

On August 9, 2001, TAMSA filed with the NAFTA Secretariat, United States Section, a timely request for panel review to contest certain determinations made by the Commission in its sunset review. On August 15, the NAFTA Secretariat issued a notice of the request in the Federal Register.[3] On September 7, 2001, TAMSA filed its Complaint along with a Statement of the Precise Nature of the Complaint

The Complainant TAMSA filed its NAFTA Panel Rule 57 Brief in support of the Complaint on December 10, 2001. Briefs in response to the Complaint were filed by the Commission and the Interested Parties on February 8, 2002. TAMSA's Reply Brief was filed on February 26, 2002. Following a suspension of the proceeding, the Panel Review was reactivated in 2006. At the request of the Panel, supplementary briefs were filed by the Participants on July 19, 2006. An oral hearing at which all of the Participants provided testimony was held on August 22, 2006.

The Panel hereby renders its decision in accordance with Article 1904.8 of the NAFTA and Part VII of the NAFTA Panel Rules.

[3] 66 Fed. Reg. 42844 (August 15, 2001).

II. PROCEDURAL HISTORY

A. The Original Determination

The antidumping and countervailing duty orders subject to review under the Commission's Review Determination were entered after original determinations by the Department of Commerce ("Department") that the subject merchandise was being sold at less than fair value and receiving a subsidy, and by the Commission that the domestic OCTG industry was materially injured by reason of the subject imports ("Original Determination").[4] The Commission's Original Determination is subject to a "sunset" review after five years.

In making its Original Determination, the Commission evaluated whether the volume and price effects of the subject merchandise from the various countries should be considered separately, or on a cumulated basis. The imported merchandise would be evaluated cumulatively if the Commission determined that there was a reasonable overlap or competition between the subject imports from the different countries at issue, and between those imports and the domestic like product.[5] The Commission found that the imports of OCTG from Austria and Spain were negligible, and thus it did not cumulate them with imports of the subject merchandise from the other countries. The Commission did find a reasonable overlap of competition among the imports of OCTG from Argentina, Italy, Japan, Korea and Mexico, and between those imports and the domestic like product. The Commission further found that the cumulated imports of the subject

[4] Notice of the orders appeared at 60 Fed. Reg. 41055-59 (Aug. 11, 1995).
[5] 19 U.S.C. § 1677(7)G. The specific statutory criteria for the Commission's cumulation determination is discussed below.

merchandise from those countries caused material injury to the domestic OCTG industry. The Commission found no material injury, or threat of material injury by imports of OCTG from Austria and Spain.

B. The Commission's Sunset Review Determination

On June 3, 2000, the Commission instituted a five-year sunset review of the antidumping and countervailing duty orders on OCTG from Argentina, Italy, Japan, Korea and Mexico. On October 5, 2000, it decided to conduct full reviews pursuant to section 715 (c) of the Tariff Act to determine whether revocation of the orders on OCTG would lead to continuation or recurrence of material injury.[6] In its Review Determination, the Commission exercised its discretion to cumulate subject imports of OCTG from Argentina, Italy, Japan, Korea and Mexico.[7] Furthermore, the Commission determined that the revocation of the antidumping and countervailing duty orders on OCTG from Argentina, Italy, Japan, Korea and Mexico would be likely to lead to the continuation or recurrence of material injury to the domestic industry in the foreseeable future.[8]

III. THE STANDARD OF REVIEW

A. Panel Stands in the Place of a Court of the Importing Party

This Panel's authority derives from Chapter 19 of NAFTA. Article 1904(1) provides the "each Party shall replace judicial review of the final antidumping and countervailing duty determinations with binational panel review." Pursuant to Annex 1911 of the NAFTA, the finals result of sunset reviews of antidumping and

[6] 65 Fed. Reg. 63889 (Oct. 25, 2000).
[7] Review Determination at 24.
[8] *Id*. At 39-40.

countervailing duty orders are "determinations" that are reviewable pursuant to Article 1904. Article 1904(2) requires that the panel determine whether such determinations were:

> . . . in accordance with the antidumping and countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing the final determination of the competent investigating authority.

Article 1904(3) states that the panel shall apply ". . . the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." If this appeal were not before this Panel, it would be before the United States Court of International Trade ("CIT"). This Panel stands in the same position that the CIT would occupy but for Article 1904. The standard of review that would be applied by the CIT, and must be applied by this Panel, is set forth in §516a(b)(1)(B)(i) of the Tariff Act, codified at 19 U.S. Code §1516a(b)(1)(B)(i). This provision requires that the panel "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law…"

B. The Substantial Evidence Standard of Review

NAFTA Article 1904(2) requires that the Panel make its review based on the administrative record in the underlying sunset review. The Panel may not undertake a *de novo* review of the Commission's determination.[9] The Panel must affirm the Commission's Review Determination unless it concludes that the determination is not

[9] *See Cabot Corp. v. United States*, 694 F.Supp. 949, 952-52, (Ct. Int'l Trade 1988); *Ceramica Regiomontana, S.A. v. United States*, 636 F.Supp. 961, 966 (Ct. Int'l Trade 1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

supported by substantial evidence on the record. The United States Supreme Court has defined "substantial evidence" as " more than a mere scintilla . . . 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . .'"[10]

The United States Court of Appeals for the Federal Circuit ("CAFC") has applied the same interpretation of "substantial evidence" in reviewing administrative agency determinations in international trade investigations. As noted by the CAFC, "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[11]

To this rule, the CIT has added that it is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record."[12] Neither a Chapter 19 panel nor a reviewing court "may . . . substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo'"[13]

Nevertheless, as the CAFC stressed in *Gerald Metals, Inc. v. United States*[14], the substantial standard of review requires more than a mere assertion of evidence that justifies the Commission's determination. Rather, the Commission must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn. The Commission must examine contradictory evidence and alternative causes of

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[10] *NLRB v. Columbian Enameling & Stamping Co*., 306 U.S. 292, 300 (1939)(quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).
[11] *Matsushita Electric Industrial Co. v. United States*, 750 F. 2d 927, 933 (1984) (quoting [11] *Consolo v. Federal Maritime Comm'n*, 382 U.S. at 619-20.
[12] *Koyo Seiko Co., Ltd. v. United States*, 810 F. Supp. 1287, 12 (Ct. Int'l Trade 1993)(quoting *Timken Co. v. United States*, 699 F. Supp. 300, 306 (1988), *aff'd* 894 F. 2d 385 (Fed. Cir, 1990)).
[13] *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985)(quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 348).
[14] 132 F.3d 716, 720 (1977).

injury "to ensure that the subject imports are causing injury, not simply contributing to the injury in a tangential or minimal way."[15]

C. The "Otherwise Not in Accordance with Law" Standard of Review

In determining whether the Commission's interpretation of the governing statute is "in accordance with law," the Panel follows the two-stage approach adopted by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc*., 467 U.S. 837 (1984) ("*Chevron*"). First, if the intent of Congress is unambiguous, the judiciary (i.e., the Panel) would be the final authority to determine whether an administrative interpretation is consistent with clear congressional intent. If the statute is silent or ambiguous, the "question for the court is whether the agency's answer is based on a permissible construction of the statute.[16] The "agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding."[17] As long as the agency's interpretation is reasonable, that is sufficient under the *Chevron* ruling.

It is a principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding must be supported by reasoned decision making, with the various connections among the agency's fact findings, its reasoning process, and its conclusions being sufficiently clear.[18] The agency's decisional path must be reasonably discernable from its determination. Within the four corners of its determination, the agency must

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[15] *Taiwan Semiconductor Indus. Ass'n v. U.S. Int'l Trade Comm'n*, 266 F.3d 1339, 1345 (Fed. Cir. 2001). Note that this decision involved a review of a material injury determination in an antidumping investigation. The threshold of injury required for an affirmative finding in an antidumping or countervailing duty investigation is higher than the injury standard applied in a sunset review.
[16] *Chevron*, at 842-843.
[17] *Id*.
[18] *See Securities & Exchange Comm'n v. Chenery Corp*, 332 U.S. 194, 196-97 (1947): *Burlington Truck Lines v. United States*, 371 U.S. 156-168-69 (1962).

articulate a rational connection between the facts found and the choice made.[19]

IV. STATEMENT OF THE ISSUES

A. Definition of Likely

Whether the Commission applied an unlawful standard for sunset reviews by misinterpreting the term "likely" in its determinations that (1) imports from Mexico would be likely to lead to a continuation or recurrence of injury, and (2) that imports of OCTG from Mexico would be likely to compete with the subject imports from other countries and with the domestic like product.

B. Cumulation

Whether the Commission's decision to cumulate the effects of imports of OCTG from Mexico with such subject merchandise from Argentina, Italy, Japan, and Korea was supported by substantial evidence on the record or otherwise in accordance with law.

C. Likely Continuation or Recurrence of Material Injury

Whether the Commission's determination that revocation of the antidumping and countervailing duty orders on imports of OCTG from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to the continuation or recurrence of material injury was supported by substantial evidence on the record or otherwise in accordance with law.

[19] *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 286 (1974); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1988).

V. DISCUSSION AND ANALYSIS

A. The Likely Standard

In its Brief in support of the Complaint ("TAMSA Brief") , TAMSA alleges that the Commission has misinterpreted the unambiguous plain language of the Tariff Act and re-defined the term "likely" inconsistent with its ordinary meaning. Complainant refers to two determinations made by the Commission in which it alleges that the agency incorrectly defined the term: (1) the cumulation determination that the subject imports from Mexico would be "likely" to compete with the subject imports from other countries and with the domestic like product[20], and (2) the injury determination that the revocation of the antidumping and countervailing duty orders would be "likely" to lead to a continuation or recurrence of material injury.[21] The Complainant requested that the Commission remand the case to the Commission with instructions to apply the "plain meaning" of the word likely (i.e. "probable" or "more probable than not") in the statutory determinations made in its Review Determination.

The Commission, and the representatives of the domestic producers of OCTG, argued in their Response Briefs that, where as in this case, the meaning of the term is not plain, the agency must be given deference in the manner in which it defines and applies it in its investigation. Furthermore, the Commission argued that the term could be correctly applied in cases where there were more than one possible outcomes, rather than cases where there would be only one likely outcome as argued by Complainant. The Commission argued that the definition of "likely" was broader than alleged by the Complainant and in the discretion of the agency to determine. The Panel notes that in

[20] 19 U.S.C.1675a(a)(7).
[21] 19 U.S.C.§ 1675(a).

making its cumulation and material injury determinations, however, the Commission did not specifically state which standard of "likely" it applied, but rather that the determinations were, in general, based on substantial evidence on the record and otherwise in accordance with the law.

Subsequent to their submissions, the CIT has issued several decisions regarding the definition of "likely" in the statute governing sunset reviews. The term has been interpreted by the CIT to mean "probable" or "more likely than not."[22] In particular, the CIT ruled on the definition of "likely" in a case that involved the same Review Determination and the same issues as are the subject of this panel review. The CIT ruling was issued in the case of *Siderca S.A.I.C., et. al. v. United States*, ("*Siderca*").[23]

In *Siderca*, Plaintiffs Siderca from Argentina, Dalmine, from Italy, and NKK Tubes from Japan ("Plaintiffs') [24], challenged the same Review Determination that is the subject of this panel review. Plaintiffs challenged the Commission's Review Determination arguing, among other claims, that the Commission's interpretation of the term "likely" on the governing statute was not in accordance with law. In response, the CIT initially remanded the Review Determination to the Commission directing the agency to indicate what standard it had actually used, and if the standard was incorrect, to revisit its determination accordingly. In its remand determination, the Commission stated:

> The Commission hereby provides the following clarification in response to the Court's April 5, 2005 [remand] order. The "likely" standard has

[22] *See, e.g. Siderca, S.A.I.C. v. United States*, 350 F. Supp. 2d 1223 (Ct. Int'l Trade 2004); *NMB Singapore Ltd. v. United States*, 288 F. Supp. 1306 (Ct. Int'l Trade 2003); *Usinor Beator v. United States*, 342 F. Supp. 2d.1267 (Ct. Int'l Trade 2004).
[23] 391 F. Supp. 2d. 1353 (CIT 2005).
[24] The three foreign producers are members of the same multinational entity, the Tenaris Group, of which TAMSA is also a member.

> been the subject of several decisions by the Court, and of several Commission remands. The Commission has never applied a standard that equates "likely" with "possible," either in the determination at issue here or in any previous five-year review determination. In our original views in these reviews we applied a "likely" standard that is consistent with how the Court has defined that term in Slip Op. 04-133 as well in prior opinions addressing this issue.[25]

Accordingly, in its remand determination involving the same Review Determination, the Commission has declared to the CIT that it applied the "likely" standard consistent with the definition determined by the CIT in prior determinations, namely "probable" or "more likely than not." In its prayer for relief in this panel investigation, Complainant TAMSA requests the that Panel find that the Commission has misapplied the "likely" standard in making its cumulation and material injury determination, and that the Panel remand the results of the Commission's findings with instructions to amend the Remand Determination in accordance with the proper "likely" standard.

Given the remand determination of the Commission in the *Siderca* case, this Panel sees no need to remand the Commission's determination on the question of the definition of the standard of "likely" applied by the Commission in the Review Determination. The Commission has already stated to a United States court reviewing the same determination as is the subject of this panel review that it has applied a "likely' standard consistent with the definitions that have been determined by the CIT in previous cases. Were this Panel to remand the question to the agency, it would certainly restate its prior position.

[25] Response of Commission to Remand Order (June 6, 2005).

This Panel is therefore left with the question as to whether, applying the appropriate standard of "likely", the Commission misapplied that standard in making its affirmative determinations on cumulation and material injury. In other words, the Panel is left with determining whether there substantial evidence on the record to support the Commission's determinations using a standard of "likely" equivalent to "probable" or "more likely than not"?

The Panel notes that this approach is consistent with that taken by the CIT in the parallel *Siderca* case:

> In its remand determination, the ITC states "in our original views in these reviews we applied a 'likely' standard that is consistent with how the Court has defined the term in *Siderca , S.A.I.C., et. Al. v, United States, Consol. Ct. No. 01-692 (June 6, 2005)*." The court will accept this statement as an assertion that the evidence amassed and cited by the agency is such as to meet or surpass the burden under the "probable" standard. Therefore, at this juncture, the only way in which the agency's statement can be measured is by the sum of the record evidence that supports the agency's determination here.[26]

B. Cumulation

In the Prayer for Relief in the TAMSA Brief, Complainant requests the Panel to "find that the Commission misapplied the 'likely' standard for sunset reviews in its determination that imports of OCTG from Mexico were 'likely' to compete with other subject imports and with the domestic like product."[27] In the Prayer for Relief of its Supplemental Brief (TAMSA Supplemental Brief), TAMSA requests that the Panel "Determine that the Commission's decision to cumulate imports of OCTG from Mexico

[26] *Siderca* at 1357.
[27] TAMSA Brief at 39.

with other subject imports was contrary to law, and/or was not supported by substantial evidence."[28]

The Tariff Act provides that "[T]he Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under 1675(b) and 1675 (c) [sunset reviews] of this title were initiated on the same day, if such imports would be likely to compete with each other and with the domestic like products in the United States market."[29] In determining whether the subject imports would be likely to compete with each other, the Commission traditionally considers four subfactors:

(1) the degree of fungibility between the imports from different countries and between imports and the domestic like product;

(2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

(4) whether the imports are simultaneously present in the market.

In examining these factors, the Commission bears in mind that only a "reasonable overlap" of competition is required.[30] "Cumulation does not require two products to be highly fungible."[31] Likewise, "completely overlapping markets are not required.".[32]

1. Fungibility

In the TAMSA Brief, Complainant argues that welded and seamless OCTG are not fungible because they are sold at different prices in the U.S. market and, while

[28] TAMSA Supplemental Brief at 30.
[29] 19 U.S.C. § 1675a(a)(7).
[30] Review Determination at 11 n.33 (citing, *e.g. Wieland Werke*, AG v. United States (718 F.Supp. at 52).
[31] *Goss Graphics System, Inc. v. United States*, 33 F. Supp. 2d at 1087, *aff'd* 216 F.3d 1357 (Fed.. Cir. 2000).
[32] *Wieland Werke*, n 30.

substitutable "in theory", customers do not substitute them due to the price disparity between the two products.[33] TAMSA does not argue that welded or seamless tubing from Mexico is not fungible with the welded or seamless tubing, respectively, imported from other countries or manufactured in this country.

In the Commission Brief in response to the TAMSA brief, the agency noted that it found in the underlying sunset review that there was generally no dispute that subject imports from Mexico, Argentina, and Japan competed with each other and with the domestic like product.[34] With respect to the question of the fungibility of welded and seamless OCTG, the Commission noted that the record demonstrated that 26 out of 34 purchasers stated that welded and seamless OCTG are substitutable in at least some applications.[35] The Commission, in its Supplemental Brief ("Commission's Supplemental Brief) noted that the record indicated that Mexican manufacturers produced and exported both welded and seamless OCTG to the United States, which were both competitive with subject imports and the domestic like product. Thus, for Mexico as a whole, it would make no difference whether or not, for purposes of cumulation, welded and seamless OCTG were deemed to be non-fungible. The Commission also noted that the CIT, in *Siderca*, held that certain Italian and Japanese respondents had in a sense waived their argument as to fungibility of welded and seamless OCTG because they had failed to raise the argument at the time the underlying sunset review was initiated.[36] The Commission argues that the same point can be made about TAMSA.

[33] TAMSA Brief at 37.
[34] Review Determination at 34-36.
[35] *Id*.18-19 & n. 59.
[36] *Siderca* at 1362.

The Panel determines that there was substantial evidence on the record to justify the Commission's determination on fungibility and that such determination was otherwise in accordance with law.

2. Presence in the Same Geographic Markets

TAMSA makes no reference to evidence on the record that would undercut the determination of the Commission that OCTG from Mexico, and all of the other subject countries, were sold in the same market in which the domestic like product was also sold. TAMSA argues that Commission's finding that there was nothing on the record to demonstrate a different determination from that made in original antidumping and countervailing duty investigation should be rejected. Rather the Commission must demonstrate that the record evidence must affirmatively demonstrate that the result "likely" would be the same.

The Panel is of the view that the Commission did just that. In its Review Determination, the Commission noted that, both in the original investigation and the sunset review, the record indicated that the vast majority of the subject imports, including those from Mexico, entered the United States through the customs districts in Texas and were generally sold to distributors near the Gulf of Mexico for resale throughout the United States. [37] In addition, sales of the domestic like product were also concentrated in the Gulf of Mexico region.[38] TAMSA cites no evidence on the record to refute these conclusions.

[37] Review Determination at 22; Original Determination at 32.
[38] *Id.*

Accordingly, the Panel determines that there was substantial evidence on the record to justify the Commission's determination on presence in the same geographic market and that such determination was otherwise in accordance with law.

3. Channels of Distribution

TAMSA asserts that it sells OCTG "almost all to end users"[39] where as most other imported and domestic OCTG is sold through distributors. Accordingly the subject merchandise produced by TAMSA is, according to that company, not sold in the same channels of distribution as that of imports of the subject merchandise from other countries or of the domestic like product. TAMSA makes no statement regarding the channels of distribution of OCTG sold by the other Mexican producer, Hylsa, in the United States.

The Commission found, relying upon data supplied by TAMSA, that a portion of TAMSA's product line was in fact sold in the United States through distributors.[40] The Commission noted that it must consider all imports from Mexico and that only a reasonable overlap of competition was required. [41]

The Panel determines that there was substantial evidence on the record to justify the Commission's determination regarding the channels of imports from Mexico and that such determination was otherwise in accordance with law.

4. Simultaneous Presence in the Market.

TAMSA, as in its argument regarding simultaneous presence in the same geographic markets points to no evidence on the record in opposition to the Commission's conclusion that OCTG from all subject countries, including Mexico, and

[39] TAMSA Brief at 38.
[40] Commission Brief at 57.
[41] *Id*.

the domestic like product were sold simultaneously in the same geographic markets. TAMSA refers to the statement of the Commission that "Nothing on the record of these reviews suggests that if the orders were revoked subject imports and the domestic like product would not be simultaneously present in the domestic market."[42] TAMSA argues that, rather than demonstrate what is likely not to happen, the Commission must demonstrate that the record evidence affirmatively demonstrates that the products would likely be simultaneously present in the market.

In the view of the Panel, the Commission did demonstrate that there was substantial evidence on the record to support its conclusion. The Commission referenced evidence on the record indicating that imports from the five subject countries were present in the market each year from 1992 through 2000. The Commission simply noted that, having demonstrated that the subject imports from each of the five subject countries had been simultaneously present in the market during the nine years preceding its Review Determination, there was, in addition, nothing on the record to indicate that a change would occur in the future.[43]

Accordingly, the Panel determines that there was substantial evidence on the record to justify the Commission's determination on simultaneous presence in the market and that such determination was otherwise in accordance with law.

Taking the record evidence relating to these four subfactors as a whole the Panel finds that the evidence supports the Commission's determination that it is probable and more likely than not that imports of the subject merchandise as a whole will compete with other subject imports and with the domestic like product in the United States market.

[42] Review Determination at 23.
[43] Commission Brief at 58.

5. The CIT decision in Siderca

As indicated, subsequent to the initiation of this panel proceeding, the CIT handed down a decision in *Siderca* involving the same Review Determination as is the subject of this panel review. Decisions of the CIT are not binding upon NAFTA panels. However, since the Panel is required to act as if it were a court in the United States, and since the court it would act like (i.e. replace) in most cases is the CIT, decisions of that court should be taken into consideration by NAFTA panels in rendering their own decisions.

TAMSA argues that the determination reviewed by the CIT is not the same determination that is being reviewed in this Panel proceeding, apparently because the former was a "remand" determination. The Panel is not completely clear as to the thrust of TAMSA's argument, but in any case it is not relevant to the Panel's consideration of the *Siderca* decision. In *Siderca*, the CIT considered the same product, the same foreign and domestic producers, and the same issues that are found in the sunset review as is the subject of this Panel's review. The only difference, with respect to the question of cumulation, is that the scope of the CIT's jurisdiction included imports of OCTG from the non-NAFTA countries involved in the sunset review, whereas this Panel's jurisdiction is limited to imports from Mexico. Notwithstanding this division of jurisdiction, the conclusions made by the CIT regarding the question of cumulation, were based in many cases upon imports of the subject merchandise from all countries, including Mexico. To the extent that the CIT's decisions referenced imports from Mexico, they provide useful U.S. judicial precedent that is appropriate for this Panel to take into consideration in this Panel review.[44]

[44] "[J]udicial precedents" are part of the law of the importing country this Panel must consider in

The CIT affirmed the Commission's affirmative conclusion on fungibility regarding both welded and seamless OCTG and with respect to the subject merchandise from all of the countries subject to the sunset review and with the domestic like product.[45] In rendering its decision, the CIT did not exclude Mexico from its discussion or analysis.[46]

With respect to the subfactor of sales in the same geographic markets, the CIT affirmed the Commission's finding that the subject imports and the domestic like product competed in the same geographic markets.[47] In making its determination, the CIT considered imports from all subject countries as a whole and did not exclude Mexico from the scope of its finding.

The CIT affirmed the Commission's determination regarding channels of distribution. The Court found that Tenaris members made sales to distributors in the United States and that the "distributor market remains the primary method by which OCTG is sold in the U.S. . . . It seems to the court that plaintiff's argument rests entirely on what they would 'prefer' to do. However, their past and present behavior in the U.S. market shows that they have no real aversion to selling to distributors."[48]

The CIT also affirmed the Commission's affirmative decision regarding simultaneous presence in the market, noting that the record demonstrated that each of the subject countries, including Mexico, sold subject merchandise in the United States during each year of the Original Investigation period of review. In addition, the CIT found that

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determining whether the Review Determination is in accordance with the antidumping and countervailing duty law of the United States. *See* NAFTA Section 1904(2).

[45] *Siderca* at 1363.

[46] *See* references to Mexico in *Siderca* at n.4, n.8, and at 1361, 1363.

[47] *Siderca* at 1365.

[48] *Id.* at 1364.

OCTG was not a seasonal good such that the domestic and foreign producers would sell the goods at mutually exclusive times.[49]

Thus, the Panel's findings regarding the four subfactors used to determine whether subject merchandise from more than one subject country can be cumulated was consistent with, and supported by, the decision of the CIT.

For the reasons stated herein, the Panel finds that the determination of the Commission to cumulate imports of OCTG from Mexico with imports of the subject merchandise from the other subject countries is supported by substantial evidence on the record and otherwise in accordance with law.

C. Continuation or Recurrence of Material Injury

In the Prayer for Relief in the TAMSA Brief, Complainant requests the Panel to "find that the Commission misapplied the "likely" standard for sunset reviews in its determination that imports of OCTG from Mexico were 'likely to lead to the continuation or recurrence of injury to the domestic industry'"[50], if the orders were revoked.

The Tariff Act states:

> (1) In General - In a review conducted under … 751(c) [sunset review], the Commission shall determine whether revocation of an order…would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked. . .
> . . .
> (2) Volume – In evaluating the likely volume of imports of the subject merchandise if the order is revoked . . ., the Commission shall consider whether the likely volume of imports of the subject merchandise would be

[49] *Id.* at 1365.
[50] TAMSA Brief at 39.

significant if the order is revoked . . ., either in absolute terms or relative to production or consumption in the United States. In doing so, the Commission shall consider all relevant economic factors, including –

> (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
>
> (B) existing inventories of the subject merchandise, or likely increases in inventories,
>
> (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
>
> (D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

(3) Price – In evaluating the likely price effects of imports of the subject merchandise, if the order is revoked . . ., that Commission shall consider whether-

> (A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and
>
> (B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.

4. Impact on the Industry – In evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked . . ., the Commission shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to –

> (A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
>
> (C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product ….[51]

[51] 19 U.S.C. 1675a(a)

As indicated, the Panel found that the Commission properly exercised its discretion to cumulate imports of OCTG from all five of the subject countries. Accordingly, the question of whether the agency's determination that revocation of the orders would likely lead to the continuation or recurrence of material injury must be addressed on the basis of an analysis of all imports of the subject merchandise, not just imports of TAMSA or Mexican product.

At the outset, with regard to the agency determination, it would appear that TAMSA would have the Panel weigh the conflicting assertions of the Participants in this proceeding and reach a conclusion different from that of the Commission. If this were a de novo review of the determination, it might be permissible to do so. However, this NAFTA Panel is prohibited from doing either. As noted above, the CAFC has ruled that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence." [52] The CIT has determined that a Court may not "weigh the adequate quality of quantity of the evidence or reject a finding on grounds of a differing interpretation of the record." [53] Neither a NAFTA Panel nor a reviewing court "may substitute its judgment for that of an agency when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo."[54]

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[52] *Matsushita Electric Industrial Co. v. United States*, 750 F. 2d 927, 933 (1984) (quoting [52] *Consolo v. Federal Maritime Comm'n*, 382 U.S. at 619-20.

[53] *Koyo Seiko Co., Ltd. v. United States*, 810 F. Supp. 1287, 12 (Ct. Int'l Trade 1993)(quoting *Timken Co. v. United States*, 699 F. Supp. 300, 306 (1988), *aff'd* 894 F. 2d 385 (Fed. Cir, 1990))

[54] *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985)(quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 348).

1. Volume

In its Brief in Support of the Complaint, TAMSA raises a number of points, based on evidence on the record, in opposition to the Commission's determination that the volume of imports of OCTG would be significant if the orders were to be revoked. TAMSA's discussion refers only to imports from TAMSA or from Mexico as a whole. No arguments are raised with respect to imports from the other subject countries in the TAMSA Brief. The points in opposition to the Commission's conclusion are:

- TAMSA and Hylsa are operating at full capacity and have long lead times;
- TAMSA has long-term commitments and arrangements in its home market and third-country markets where OCTG demand is high and expected to remain high;
- There are not existing barriers to importation of subject merchandise from Mexico into countries other than the United States;
- TAMSA must dedicate is production capacity to other products with which it also has long-term sales commitments;
- Inventories in Mexico are low and there are no inventories held by U.S. importers;
- TAMSA has long-term relationships with customers in its home and principal export markets, and it sells directly to end users bypassing distributors;
- Since TAMSA sells primarily to end users, its sales in the U.S. market are "miniscule" because distributors dominate that market; and
- TAMSA is the primary supplier to PEMEX, in Mexico, and it supplies OCTG to PEMEX, and independent drilling companies in Mexico and Venezuela on a just-in-time basis.[55]

[55] TAMSA Brief at 19-20.

In the Commission Brief, the agency raised a number of arguments, based upon evidence on the record, in support of its affirmative determination on volume of the subject imports. The Commission noted that in the Original Investigation, the rate of increase in the volume of cumulated subject imports was far greater than the overall increase I consumption during the period of review (1992-1994).[56] The Commission concluded in the Original Investigation that the volume and market share of subject imports was significant.[57]

With respect to the sunset review, the Commission referred to a number of points in its Review Determination in support of its conclusion that the likely volume of imports as a whole would be significant if the order were revoked:

- While the volume of imports of subject merchandise during the period of review of the sunset investigation was relatively low, that was a reflection of the restraining impact of the outstanding antidumping and countervailing duty orders. There was also a recent increase in imports in 2000.

- Foreign producers can shift production from other pipe and tube products to OCTG, all of which are produced on the same machinery and equipment

- Combined capacity to produce both OCTG and other pipe and tube products was high in comparison to total U.S. consumption of OCTG.

- Only one Japanese producer provided capacity information to the Commission during the sunset review. The capacity figures reviewed by the Commission did not include a substantial portion of the capacity of producers in Japan. In the Original Investigation, the Japan was the largest exporter of OCTG to the United States.

[56] In making its material injury determination, the Tariff Act directs the Commission to take into account prior injury determinations, including the volume, price effect, and impact of imports on the industry before the order was issued. 19 U.S.C. 1675a(a)(1)(A).
[57] Commission Brief at 67.

- Capacity utilization of producers in Japan and Korea was relatively low.

- Foreign producers have a great incentive to ship to the U.S. market. The Tenaris group of producers in various of the subject countries, including TAMSA, which is the dominant supplier of OCTG to all countries other than the United States, acknowledged that the United States represents the largest market in the world for seamless OCTG. OCTG are among the highest valued pipe and tube products, generating among the highest profit margins. Prices in the world market for OCTG are significantly lower than prices in the United States.

- Producers in the subject countries face import barriers in the United States on other pipe and tube products given existing antidumping orders on a variety of seamless and welded pipe and tube products, other than OCTG.

- The OCTG industries in all of the five subject countries have relatively small home markets and depend upon exports for a majority of their sales.[58]

With respect specifically to TAMSA and Mexico, the Commission made certain additional points in support of its findings on volume:

- TAMSA's imports increased in 2000.

- TAMSA did make sales to distributors in the United States.

- TAMSA provides little evidence with respect to Hylsa, the other Mexican producer.[59]

In its Brief in Reply ("TAMSA Reply Brief") to the Response Briefs of the Commission and the other Interested Parties, TAMSA argued that:

[58] Commission Brief at 66-72.
[59] *Id* at 76.

- The Commission found that certain producers had high capacity rates which represents a potentially important restraint on their ability to increase shipments of OCTG.

- The Commission makes no assertion that the level of inventories were significant or threatening.

- The existence of incentives to ship to the U.S. market does not demonstrate that subject producers would be likely to ship significant volumes of OCTG.

- Foreign producers have long-term customer relationships in other countries which would limit the possibility of shifting sales to the United States.

- There are few antidumping or countervailing duty orders imposed by other countries that would force a diversion of shipments to the United States.

- The relatively high market price in the United States is not an incentive to ship to that market because price is less important selling factor than service to end users.

- Foreign producers sales to other markets are made primarily to end users.

- The price of certain drill pipe in the United States exceeded the price of OCTG products.[60]

Based upon the arguments submitted by the Participants and the cited record evidence, the Panel concludes that there is substantial evidence on the record to support the conclusions of the Commission that the "likely" volume of imports of subject merchandise would be substantial if the orders were to be revoked. The Panel's decision is based upon a standard of "likely" defined as probable or more likely than not.

[60] TAMSA Reply Brief at 31-46.

In the first place, the Commission's analysis is based upon imports of all subject merchandise from all subject countries. The arguments raised by TAMSA generally refer only to its production, or that of Mexico, or that of selected other foreign producers. For example, as pointed out by Mr. Sulton, Counsel for the Commission, at the Oral Hearing of the Panel, the reference by the Commission to high capacity utilization rates referred only to certain foreign producers, but not producers in Japan and Korea.[61] The Commission's conclusions can be considered conservative given that data on the majority of the production in Japan, which was the primary exporter of OCTG to the United States in the Original Investigation, was not even included on the record.

The fact that the United States was the largest market in the world for OCTG, that prices in the United States were significantly higher than world prices, that access to the U.S. market had been limited following the imposition of the orders, that there was capacity to produce OCTG, that most subject producers of OCTG depend primarily on export sales, that it is easy to shift production from other pipe and tube products produced using the same equipment and facilities as OCTG, and that there were limits on the shipment of many of these other pipe and tubing products to the United States imposed by outstanding antidumping and countervailing duty orders, represents ample substantial evidence on the record to support the Commission's conclusions regarding incentives and volume. These facts, combined with the determination of the Commission in the Original Investigation, lead the Panel to affirm the agency's finding.

Many of the arguments raised by TAMSA were limited to its production, or that of Mexico as a whole. In addition, certain of Complainant's arguments were undercut by

[61] Transcript of Oral Hearing at 58.

evidence of sales to distributors and to an increase in sales in 2000. The Panel notes the testimony by Mr. Sulton at the Panel Hearing that the official responsible for the Tenaris OCTG sales testified at the Commission's sunset review hearing that 55 percent of the group's sales were subject to long-term contracts, leaving a substantial 45 percent of the sales that were not encumbered by commitments to customers.[62] Furthermore, the Commission in its Review Determination, confirmed that TAMSA itself had sales to distributors in the United States.[63]

The only determination the Panel is required to make is whether there is substantial evidence on the record to support the Commission's determination on volume. The Panel finds that there is.

2. Price

In the TAMSA Brief, the Complainant states that "the Commission also acknowledged that it lacked affirmative evidence demonstrating that imports would 'likely' undersell domestic product prices or "likely" cause price depression or suppression after the orders are revoked. Confidential Opinion [Review Determination at 36] ('trend in prices . . . varied by product . . . direct selling comparisons are limited . . . few direct comparisons…')."[64] TAMSA also argues that its shipments comprise large diameter OCTG which would not have noticeable price effects on sales of welded and small diameter OCTG in the U.S. market.

[62] *Id.* at 61.
[63] Review Determination, n73.
[64] TAMSA Brief at 21.

The Panel finds TAMSA's statement regarding price depression or suppression to be misleading. On page 36 of its Review Determination, the full text referenced by TAMSA states:

> While direct selling comparisons are limited because the subject producers had a limited presence in the U.S. market during the period of review, the few direct comparisons that can be made indicate that the subject casing and tubing generally undersold the domestic like product especially in 1999 and 2000. (Emphasis added).

In the Commission Brief, the agency noted that, in its Original Investigation, it found that the domestic and imported OCTG were generally substitutable and that price is one of the most important factors in purchasing decisions. It also found that underselling by the subject merchandise was significant and that the cumulated imports also suppressed domestic prices to a significant degree.[65]

With respect to the sunset review, the Commission noted that it did find price underselling by the subject OCTG, as noted above. The Commission further found that:

> [g]iven [1] the likely significant volume of subject imports, [2] the high level of substitutability between the subject imports and domestic like product, [3] the importance of price in purchasing decisions, [4] the volatile nature of U.S. demand, and [5] the underselling by the subject imports in the original investigations and during the current review period casing and tubing from Mexico, Argentina, Italy, Japan and Korea likely would compete on the basis of price in order to gain additional market share in the absence of orders . . . and that such price-based competition

[65] Commission Brief at 77-78.

by subject imports would likely would have significant depressing or suppressing affects on prices of the domestic like product.[66]

The Commission argues that, other than making references to its own sales strategy and price of certain of its products, TAMSA cites no evidence that would undercut the Commission's determination regarding the price effects of the subject merchandise as a whole.. The Panel is in agreement with the conclusion of the Commission. The Panel finds that the determination of the Commission that revocation of the orders would likely lead to significant price underselling and price suppression is supported by substantial evidence on the record.

3. Impact on the Industry

TAMSA argues that that the Commission ". . . fails to analyze or discuss what evidence affirmatively demonstrates the industry's condition will worsen in the face of the current positive position of the industry, a lack of vulnerability, and strong demand conditions in the near term.[67] TAMSA also argues that the agency "fails to analyze or discuss what evidence affirmatively supports its conclusions that cumulated subject imports, including those from Mexico, would likely significantly increase and likely have an adverse impact on 'the production, shipments, sales, market share, and revenues of the domestic industry. . . There is absolutely no showing by the Commission how these factors would result in the 'likely' erosion of the domestic industry's profitability as well at is ability to raise capital and make and maintain necessary capital investments."[68]

[66] *Id* at 79.
[67] TAMSA Brief at 23.
[68] *Id*. At 23-24.

In the Commission Brief, the agency focused on its findings in the Original Investigation, which it is directed to do under the Tariff Act.[69] The Commission found that the adverse impact of the cumulated imports was:

> reflected in the poor operating performance of the domestic industry, despite a sharp increase in U.S. consumption. It was also reflected in the decline in U.S. market share . . . from 1992 – 1994. The Commission noted that during the years examined in the original investigation, subject imports captured a significant portion of the increase in consumption, and took market share away from domestic producers. Rev. Det. at 37. The Commission further found that the large volumes of cumulated subject imports, which purchasers generally viewed as good substitutes for the domestic product, were inhibiting the domestic industry from increasing market share and from raising prices. The Commission thus found in the original investigation that suppliers had to compete for market share and the lowest price would prevail. The Commission noted in addition that it determined that the adverse impact of cumulated subject imports was also reflected in the inability of the domestic industry to raise prices sufficiently to cover costs between 1992 and 1994.[70]

Complainant cited no specific evidence on the record to refute the conclusions drawn by the Commission with respect to the Original Investigation.

With respect to the record in the sunset review, the Commission acknowledged that the current condition of the domestic industry was positive, but concluded that the health of the industry could be attributed to the restraining effect of the antidumping and countervailing duty orders. The Commission had affirmatively determined that the revocation of the orders would likely lead to a significant increase in volume of the subject imports and that imported product would undersell the domestic like product and

[69] *See* n.52.
[70] Commission Brief at 81–82.

significantly depress or suppress the domestic industry's prices.[71] The Commission concluded that;

> these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. It also found that this reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability and its ability to raise capital and make and maintain necessary capital investments. Rev. Det. At 39-40.[72]

Again, the Complainant cites no specific evidence on the record, other than references to sales policy by TAMSA, that would refute or undercut the conclusions drawn by the Commission.

In a sunset determination analysis, the Commission is directed under the statute to give consideration to the conditions that existed before the underlying antidumping and countervailing duty orders were in effect. In addition, the Commission is directed to determine the probably impact of the revocation of such orders on the volume and pricing of the subject imports. Where there is a history of aggressive market share and pricing behavior activities on the part of the subject foreign producers, and where the conditions exist that suggest a likelihood of significant increases in volume and price underselling and price suppression, the Commission has generally found that the revocation of the orders would have the requisite negative impact upon the domestic industry producing the like product. Furthermore, determinations made by the Commission on these bases have generally been upheld by the CIT and by NAFTA panels as well.

[71] *Id*. at 82.
[72] *Id*. At 82-83.

As a case in point, the Panel notes again the material injury decision of the CIT in *Siderca*. With respect to the question of recurrence of material injury, the subject producers, the subject merchandise, the conditions of competition, the domestic industry, and the factors to be considered by the agency are identical to that found in the Commission determination that is the subject of this Panel review. In *Siderca*, the CIT ruled that:

> (1) [Volume] Accordingly, the evidence provided by the ITC is sufficient to support the conclusion that there would likely be a significant volume of imports into the U.S. upon revocation of the orders, owing to non-Tenaris Group subject producers' available capacity, and the economic incentives that Tenaris Group members have to enter the last market in which they do not have dominance, in which prices are high, and where they already have established customers[73].
>
> . . .
>
> (2) [Price] The ITC's determination demonstrates that the behavior of the producers reviewed here caused price effects in the past, that their goods are substitutable for domestic goods, and that they are likely to compete on the basis of price. The ITC has thus provided "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[74]
>
> . . .
>
> (3) [Impact on the Industry] Accordingly, the court holds that the ITC has provided substantial evidence to ground its finding that the probable or "likely" impact of subject imports would be significant, enough so as to support a finding that material injury would likely recur.[75]

For the reasons stated herein, and consistent with the decision of the CIT in the parallel case, the Panel finds that the determination that the revocation of the antidumping order and countervailing order on OCTG from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time is supported by substantial evidence on the record and otherwise in accordance with law.

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[73] *Siderca* at 1368.
[74] *Id*. at 1369.
[75] *Id.* at 1370.

The Panel makes its finding applying a standard of "likely" equivalent to probable or more likely than not.

VI. ORDER OF THE PANEL

For the foregoing reasons, the Commission's Review Determination is hereby AFFIRMED in all respects. The United States Secretary is ORDERED to issue a Notice of Final Panel Action at the appropriate time under the NAFTA Panel Rule 77(1).

ISSUE DATE: March 22, 2007

Signed in the original by:

Mark R. Sandstrom_____
Mark R. Sandstrom, Chairman

Boris Otto_____
Boris Otto

Morton Pomeranz_____
Morton Pomeranz

Fernando Serrano_____
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Gustavo Uruchurtu_____
Gustavo Uruchurtu